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Supreme Court of the United States

No. 14-556

JAMES OBERGEFELL, *et al.*, and BRITTANI HENRY, *et al.*,

Petitioners,

—v.—

RICHARD HODGES, Director,
Ohio Department of Health, *et al.*,

Respondents.

(*Caption continued on inside cover*)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* CALIFORNIA COUNCIL OF CHURCHES; CALIFORNIA FAITH FOR EQUALITY; UNITARIAN UNIVERSALIST JUSTICE MINISTRY CALIFORNIA; NORTHERN CALIFORNIA NEVADA CONFERENCE, UNITED CHURCH OF CHRIST; SOUTHERN CALIFORNIA NEVADA CONFERENCE, UNITED CHURCH OF CHRIST; PACIFIC ASSOCIATION OF REFORM RABBIS; CALIFORNIA NETWORK OF METROPOLITAN COMMUNITY CHURCHES IN SUPPORT OF PETITIONERS AND URGING REVERSAL

STACEY MARIE KAPLAN
KESSLER TOPAZ MELTZER
& CHECK, LLP
One Sansome Street
Suite 1850
San Francisco, CA 94104
(415) 400-3000

ERIC ALAN ISAACSON
Counsel of Record
655 West Broadway
Suite 1900
San Diego, California 92101
(619) 231-1058
eisaacson@rgrdlaw.com

Attorneys for Amici Curiae

No. 14-562

VALERIA TANCO, *et al.*,

Petitioners,

—v.—

BILL HASLAM, Governor of Tennessee, *et al.*,

Respondents.

No. 14-571

APRIL DEBOER, *et al.*,

Petitioners,

—v.—

RICK SNYDER, Governor of Michigan, *et al.*,

Respondents.

No. 14-574

GREGORY BOURKE, *et al.*, and TIMOTHY LOVE, *et al.*,

Petitioners,

—v.—

STEVE BESHEAR, Governor of Kentucky, *et al.*,

Respondents.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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IDENTITY AND INTEREST OF *AMICI*

Amici curiae are California-based religious organizations whose experience and insights the Court may find helpful.[1]

Amici have labored for years to protect all citizens' free exercise of religion – including the right to marry according to the precepts of their own churches and synagogues. Their work has included organizing efforts to file *amicus curiae* briefs affirming the right to marry and opposing governmental discrimination based on sexual orientation, gender, and religious doctrine.[2]

When California's Proposition 8 remained in effect, same-sex couples in California congregations were unable to enter lawful marriages in their churches and synagogues. *Amici* found the ability

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief in whole, and that no person or entity other than *amici* and their counsel made any monetary contribution toward the brief's preparation or submission. All parties have consented to the brief's filing, either through blanket letters of consent filed with the Clerk, or through written consent accompanying this brief.

[2] *See, e.g.*, Brief for Amici Curiae California Council of Churches, *et al.* (filed Feb. 28, 2013), *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); Brief of California Faith for Equality, *et al.* (filed Oct. 25, 2010), *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) Brief for Amici Curiae California Council of Churches, *et al.* (filed Jan. 15, 2009), *Strauss v. Horton*, 46 Cal. 4th 364, 377-78, 207 P.3d 48 (2009) (available online at http://www.courts.ca.gov/documents/s1680xx-amcur-councilchurch-support.pdf) (accessed March 3, 2015); Brief of Unitarian Universalist Legislative Ministry California, *et al.* (filed Feb. 3, 2010), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

of clergy to serve their congregations was deeply impaired by the California law denying equal recognition to marriages of same-sex couples. Even now that same-sex couples may lawfully marry in California's churches and synagogues, states such as Ohio and Tennessee deny equal dignity to those lawful marriages – to the great detriment of lawfully married couples when they travel through or relocate to those states and find themselves "living in marriages less respected than others." *United States v. Windsor*, 133 S.Ct. 2675, 2696 (2013).

Amici submit that civil marriage is a civil right that all Americans are entitled to enjoy, whatever their religious identity or sexual orientation. It is quite simply wrong for civil law to impose on all citizens the liturgical limitations that some faith communities place on their own religious rites of marriage. It also is wrong for a state to deny legal recognition to same-sex marriages lawfully entered in another state.

The following *Amici* file this brief:

1. *Amicus curiae* **California Council of Churches** is an organization of Christian churches representing the theological diversity of California's mainstream and progressive communities of faith. From its beginnings in 1913, the Council's membership today has grown to comprise more than 6,000 California congregations, with more than 1.5 million individual members, drawn from 21 denominations that span the spectrum of California's mainstream Protestant and Orthodox Christian communities.

Some of its member churches, particularly those affiliated with the United Church of Christ and the Universal Fellowship of Metropolitan Community Churches, gladly welcome same-sex couples seeking to be legally married in religious rites. Other states' laws denying recognition to those lawful marriages obviously directly affect these churches' members when they travel through those states, or when they must relocate to one of them – whether temporarily or permanently.

The Council's position on same-sex marriage is unequivocally pro-religious freedom and pro-church autonomy. In California's *Marriage Cases* and subsequent litigation, the California Council of Churches has consistently declared: "Our commitment to religious liberty for all and equal protection under the law leads us to assert that the State may not rely on the views of particular religious sects as a basis for denying civil marriage licenses to same-gender couples."[3]

2. *Amicus curiae* **California Faith for Equality** was organized in 2005 as a multi-faith coalition whose mission is to educate, support, and mobilize California's faith communities to promote equality for LGBT people, and to safeguard

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[3] Statement of Interest of the California Council of Churches, in as *Amici Curiae* brief of the Unitarian Universalist Association of Congregations, *et al.*, at xv-xvi (filed Sept. 26, 2007), *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (2008) (No. S147999) (*available online at* http://www.courts.ca.gov/documents/unitarianamicus.pdf) (accessed March 3, 2015); Brief of Unitarian Universalist Legislative Ministry California, *et al.*, as *Amici Curiae* at 6-7, *Perry v. Schwarzenegger*, *supra* note 2.

religious freedom. As a multi-faith organization, it respects and values the wisdom and perspectives of all faith traditions, including both those that celebrate same-sex marriage as a religious rite, and those that do not. It speaks on behalf of California's churches and their lawfully married same-sex couples, whose lawful marriages are denied equal dignity by states such as Ohio and Tennessee.

3. *Amicus Curiae* **Unitarian Universalist Justice Ministry California** (formerly called Unitarian Universalist Legislative Ministry) is a statewide justice ministry that cultivates and connects leaders and communities sharing Unitarian Universalist values and principles. The Ministry advocates public policies that: uphold the worth and dignity of every person; further justice, equity, and compassion in human relations; promote democratic processes; protect religious freedom; and engender respect for the interdependent web of all existence. As a matter of human dignity, California's Unitarian Universalist congregations and clergy have long supported same-sex couples' freedom to marry, both in Unitarian Universalist religious rites, and as a fundamental civil right. Many same-sex couples have been legally married in ceremonies solemnized by California's Unitarian Universalist clergy. Yet states such as Ohio and Tennessee refuse to recognize and accord equal dignity to lawful California marriages of same-sex couples.

4. *Amicus curiae* **Northern California Nevada Conference United Church of Christ ("NCNC")** is a manifestation of the church of Jesus Christ and a constituting body of the United

Church of Christ (UCC). The Conference's membership includes 130 local churches in the State of California, from the Oregon border to the southern borders of Inyo, Tulare, Kings, and Monterey counties. In 2005 the Conference co-sponsored the resolution adopted by the General Synod of the United Church of Christ, urging "Equal Marriage Rights for All." Clergy in many of the Conference's California churches solemnize legal marriages of committed same-sex couples.

5. *Amicus curiae* **Southern California Nevada Conference of the United Church of Christ ("SCNC")** is a faith community gathered in over 130 diverse congregations, most of them in Southern California. Its mission is to be a united and uniting community of the people of God, covenanting together for mutual support and common mission. Its denomination, the United Church of Christ (UCC), is a "mainline" Protestant denomination in the Reformed tradition, whose history is witness to a long and profound commitment to peace-seeking and advocacy of justice for all. Many same-sex couples have lawfully married in rites solemnized by its churches' clergy.

6. *Amicus curiae* **Pacific Association of Reform Rabbis ("PARR")**, represents rabbis in the Western Region of the Central Conference of American Rabbis ("CCAR"). Dedicated to the principles of Reform Judaism, PARR is an organization of over 350 Reform rabbis in California and twelve other states, one Canadian province, and New Zealand. In 1996 the CCAR endorsed civil marriage for gay people and in 2000 it recognized the right of Reform rabbis to perform

religious marriage ceremonies for gay and lesbian Jews. PARR has a direct interest in this case, as its members solemnize the legal marriages of same-sex couples in their California congregations – yet those marriages are not accorded legal recognition by states such as Ohio and Tennessee.

7. *Amicus curiae* **California Network of Metropolitan Community Churches** is a statewide organization of Metropolitan Community Churches ("MCC"). The first MCC worship service, in a Los Angeles suburb in 1968, launched an international movement of Christian churches with a particular, but by no means exclusive, outreach to the LGBT community. The MCC's California churches' ministry naturally includes solemnization of same-sex couples' lawful marriages. Those marriages are denied equal dignity by states, such as Ohio and Tennessee, which refuse to recognize them.

SUMMARY OF ARGUMENT

The "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). And civil marriage is a secular institution that "does not require any religious ceremony for its solemnization." *Maynard v. Hill*, 125 U.S. 190, 210 (1888). Nor should it require compliance with any religious doctrine or dogma. For ours is a pluralistic society, of many faiths and persuasions, whose constitutional framework must ensure fundamental liberty and equal rights for all.

It nonetheless should be clear that governmental limitations on the right to marry may seriously

abridge citizens' religious liberty. *Amici's* experience in California demonstrates that Proposition 8 did exactly that by outlawing the marriages of same-sex couples, which were being lawfully solemnized in hundreds of California's churches and synagogues. With Proposition 8's demise, California clergy again may solemnize the lawful marriages of same-sex couples in their congregations. But those marriages now are denied equal dignity under law by states such as Ohio and Tennessee.

With this brief we endeavor to show that denying same-sex couples the right to marry, and denying equal dignity under law to the marriages of same-sex couples entered lawfully in other states, both violate the First Amendment free-exercise and neutrality principles that apply to the States through the due-process and equal-protection clauses of the Fourteenth Amendment. For this Court has itself sustained the right to marry as "an exercise of religious faith." *Turner v. Safley*, 482 U.S. 78, 96 (1987); *see infra* at 9-12. And the seminal decision on marriage equality is at its core a religious-liberty precedent: In *Perez v. Sharp*,[4] a Catholic couple persuaded California's Supreme Court to overturn California's law against mixed-race marriages as a violation of their right to religious freedom under a regime of equal protection for persons of all faiths. *See infra* 12-19.

When this Court reviewed the issue nearly two decades later in *Loving v. Virginia*, 338 U.S. 1 (1967), Catholic bishops filed an *amicus curiae*

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[4] 32 Cal. 2d 711, 198 P.2d 17 (1948).

brief urging this Court to follow *Perez* because "marriage is an exercise of religion protected by the First and Fourteenth Amendments" and thus "can be restrained only upon a showing that it constitutes a grave and immediate danger to interests which the state may lawfully protect."[5] *See infra* at 19-22.

The principle is one of universal application: If Catholics in *Perez* had a religious-liberty interest in legal recognition of mixed-race marriages to be solemnized in their own churches, then Reform Jews Unitarian Universalists, as well as members of the United Church of Christ and Metropolitan Community Churches, all must have a similar religious-liberty interest in legal recognition of same-sex marriages. *See infra* at 23-29. *Amici* submit that religious liberty and equality under

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[5] Brief of *Amicus Curiae*, Urging Reversal, on behalf of John J. Russell, Bishop of Richmond; Lawrence Cardinal Shehan, Archbishop of Baltimore; Paul A. Hallinan, Archbishop of Atlanta; Philip M. Hannan, Archbishop of New Orleans; Robert E. Lucey, Archbishop of San Antonio; Joseph B. Brunini, Apostolic Administrator of Natchez-Jackson; Lawrence M. DeFalco, Bishop of Amarillo; Joseph A. Dirick, Apostolic Administrator of Nashville; Thomas K. Gorman, Bishop of Dallas-Ft. Worth; Joseph H. Hodges, Bishop of Wheeling; John L. Morkovsky, Apostolic Administrator of Galveston-Houston; Victor J. Reed, Bishop of Oklahoma City and Tulsa; L. J. Reicher, Bishop of Austin; Thomas Tschoepe, Bishop of San Angelo; Ernest L. Unterkoefler, Bishop of Charleston; Vincent S. Waters, Bishop of Raleigh; The National Catholic Conference for Interracial Justice; and The National Catholic Social Action Conference (hereinafter "Catholic Bishops' *Loving* brief") at 19 (filed Feb. 16, 1967), *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 66-395), 1967 WL 113926.

law are honored not by state laws withholding equal rights and imposing sectarian limitations concerning who may marry, but rather by recognizing marriage as a fundamental civil right shared by *all* people, of *all* faiths and persuasions, without regard to the doctrines and dogma of any particular sect or sects. *Perez* and *Turner* are sound decisions that this Court should reaffirm and follow.

That some defend withdrawal of this right, as somehow necessary to protect the religious liberty of sectarians whose churches' liturgical doctrines preclude offering religious rites of marriage to same-sex couples, reflects a profound misunderstanding of what really is at stake.

Some opponents of marriage equality have suggested that laws denying the right to marry are rationally grounded in speculative fears that honoring same-sex couples' right to equality under the civil law of matrimony somehow threatens the religious liberty of Americans whose religious liturgies do not encompass same-sex unions. The threats are illusory. *See infra* at 30-37.

ARGUMENT

A. This Court Held in *Turner v. Safley* that Although Civil Marriage Is a Secular Institution, Its Arbitrary Restriction Improperly Abridges the Free Exercise of Religion

Marriage in the United States has long been a secular civil institution, free from the many liturgical limitations that particular faith traditions are entitled to follow regarding what

marriages they will solemnize with their own religious rites.[6] A civil marriage, this Court has said, "must be founded upon the agreement of the parties" but "does not require any religious ceremony for its solemnization."[7] This is as it should be, for in a pluralistic society such as ours, sectarian doctrines and forms ought not control the exercise of a fundamental civil right.

Still it would be a mistake to think that the fundamental civil right of marriage and the constitutional right to free exercise of religion have no relation. For in addition to being a secular civil

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[6] The Pilgrims who sailed on the Mayflower, landing at Plymouth Rock in 1620, began the American tradition that lawful marriage should be "a civil thing," when in 1621 they celebrated the "first marriage in this place." 1 William Bradford, *History of the Plymouth Plantation, 1620-1647*, at 216-18 (Boston: Massachusetts Historical Society, 1912) (recounting the "first marriage in this place, which, according to the laudable custome of the Low–c[o]untries . . . was thought most requisite to be performed by the magistrate, as being a civil thing"); *see* Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty*?, 8 Stan. J. Civ. Rts. & Civ. Libs. 123, 138-39 (2012). The Pilgrims thus adopted "a doctrinal principle separating the responsibility of the church to minister to its members from the civil obligation of the magistrate to regulate and protect the rights of all." Jeremy Dupertuis Bangs, *Strangers and Pilgrims, Travellers and Sojourners: Leiden and the Foundations of the Plymouth Plantation* 640 (Plymouth, Massachusetts: General Society of Mayflower Descendents, 2009).

[7] *Maynard*, 125 U.S. at 210; *accord, e.g., Maryland v. Baldwin*, 112 U.S. 490, 494-95 (1884) ("a marriage is a civil contract, and may be made . . . without attending ceremonies, religious or civil"); *Meister v. Moore*, 96 U.S. 77, 78 (1877) ("Marriage is everywhere regarded as a civil contract.").

right, marriage also has an important place in religious life for most (if not all) communities of faith – each of which must be free to celebrate matrimonial rites on its own terms.

This Court held in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), that "the decision to marry is a fundamental right" that prison inmates retain even though incarcerated, since "the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication," and "the religious and personal aspects of the marriage commitment" remain "unaffected by the fact of confinement or the pursuit of legitimate corrections goals." *Id.* at 96. These elements of free exercise and free expression are, this Court held, "sufficient to form a constitutionally protected marital relationship in the prison context." *Id.*

The religious significance of marriage is no less important outside of prison when same-sex couples seek to marry with the blessings of clergy in Reform and Reconstructionist synagogues, and in Unitarian Universalist, United Church of Christ, and Metropolitan Community churches. State laws denying gay or lesbian couples the right to marry are unconstitutional because they directly impair "an exercise of religious faith as well as an expression of personal dedication." *Turner*, 482 U.S. at 96.

Those faith communities and their members, moreover, are entitled to equal protection of the laws, both under the Fourteenth Amendment, and under the religion clause's requirement of government neutrality with respect to religious distinctions.

B. The Seminal Decision Striking Down California Laws Against Mixed-Race Marriages Did So on Religious-Liberty Grounds

The seminal decision sustaining a mixed-race couple's right to civil marriage was a religious-liberty precedent.[8] In the California Supreme Court's 1948 decision reported officially as *Perez v. Sharp*, and by West Publishing Co. as *Perez v. Lippold*,[9] a Roman Catholic couple represented by an activist Roman Catholic lawyer successfully argued that California's ban on mixed-race marriage violated their religious freedom.[10] As the

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[8] *See* Eric Alan Isaacson, *Free Exercise for Whom? – Could The Religious-Liberty Principle that Catholics Established in Perez v. Sharp Also Protect Same-Sex Couples' Right to Marry?*, 92 U. Det. Mercy L. Rev. __ (forthcoming 2015) (August 12, 2014, working draft available online at http://works.bepress.com/eric_isaacson/1) (accessed March 3, 2015).

[9] 32 Cal. 2d 711, 198 P.2d 17 (1948). The different captions apparently resulted from a succession in the Office of County Clerk (named in his official capacity), which was reflected in one reporter, but not the other. *See* R.A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of* Perez v. Sharp, in *Race Law Stories*, 343, 344 n.6 (Rachel F. Moran & Devon W. Cabado, eds.; New York: Thomson Reuters/Foundation Press, 2008).

[10] *See generally* Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 205-31 (Oxford & New York: Oxford University Press, 2009); Fay Botham, *Almighty God Created the Races: Christianity, Interracial Marriage & American Law* 11-51 (Chapel Hill: University of North Carolina Press, 2009).

Catholics for the Common Good *amicus* brief in *Hollingsworth v. Perry* aptly observed: "The hero of *Perez* is Daniel Marshall, the President of the Catholic Interracial Council of Los Angeles, and the attorney who represented Sylvester Davis, an African-American male, and Andrea Perez, a woman of Mexican descent."[11]

Perez was deemed "white" under California law, which barred her marriage to Davis, a black man. Both were members of Saint Patrick's Catholic Church in Los Angeles, where Marshall led "a small but very determined Catholic Interracial Council" that he had formed in 1944 to advance the cause of racial equality.[12] When the Los Angeles County Clerk refused to issue Perez and Davis a marriage license because California statutes proscribed mixed-race marriages, Marshall took their case straight to California's Supreme Court, demanding a writ directing the County Clerk to issue a license. Marshall did so even though his own Church's Diocesan officials disapproved.[13]

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[11] *Amicus Curiae* Brief for Catholics for the Common Good, *et al.* at 21 (filed Jan. 29, 2013), *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013); *see also* Sharon M. Leon, *Tensions Not Unlike That Produced by a Mixed Marriage: Daniel Marshall and Catholic Challenges to Interracial Anti-Miscegenation Statutes*, 26 U.S. Catholic Historian 27 (Dec. 2008).

[12] Pascoe, *supra* note 10, at 206 & 204.

[13] Historian Peggy Pascoe explains:

> At the Los Angeles Diocese, Catholic officials were appalled that Marshall had put the Catholic Church in the position of seeming to endorse interracial marriage. When Marshall wrote to ask Auxiliary Bishop Joseph

The court papers in *Perez* starkly framed the mixed-race couple's right to marry in terms of religious liberty. "There is no rule, regulation or law of the Roman Catholic Church which forbids a white person and a Negro person from receiving conjointly the sacrament of matrimony and thus to intermarry," the couple's writ petition averred.[14] The County Clerk's refusal of a "license to intermarry" thus had denied them "the right to participate fully in the sacramental life of the religion in which they believe," thereby impinging upon "the free exercise and enjoyment . . . of their religious profession and worship."[15] An accompanying brief argued that, thanks to the many states' laws then proscribing mixed-race marriages, "petitioners are prohibited from participating in the full sacramental life of the

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> McGucken, a onetime [Catholic Interracial Council] supporter, to testify in the *Perez* case, he received an immediate, and visceral, refusal. "I cannot think of any point in existing race relationships that will stir up more passion and prejudice," McGucken fumed. "I want to make very clear that I am not at all willing to be pulled into a controversy of this kind."

Pascoe, *supra* note 10, at 214 (quoting letter from Auxiliary Bishop Joseph T. McGucken to Daniel G. Marshall, April 26, 1947, in Box 17, Folder 29, John LaFarge Papers, Georgetown University Special Collections, Washington, D.C.); *see also* Sharon M. Leon, *An Image of God: The Catholic Struggle with Eugenics* 155, 160 (Chicago: University of Chicago Press, 2013) (quoting same letter).

[14] Petition for Writ of Mandamus, ¶¶5, 6, at 3 (filed Aug. 8, 1947), *Perez v. Sharp*.

[15] *Id.*, ¶15, at 4.

religion of their choice in over 60 per cent of the states of the Union."[16]

The County of Los Angeles countered that while the couple's Church might *permit* mixed-race marriages, no religious-liberty interest could be at stake, as the Catholic faith did not demand that adherents marry outside their own race: "Marrying a person of another race, even insofar as the Church tolerates or permits it, is certainly not required."[17] "It is true that the Catholic religion forbids illicit intercourse," the County acknowledged, "but it is not necessary to marry one of another race to avoid such illicit intercourse. A good Catholic could just as well live up to his religion by avoiding the intercourse. The petitioners will not be violating their religion by failing to get married."[18]

Three of the California Supreme Court's seven justices found the County's arguments thoroughly

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[16] Memorandum of Points and Authorities, ¶XXII, at 5 (filed Aug. 8, 1947), *Perez v. Sharp*. Marshall's oral argument reiterated that his Catholic clients "have the right to participate in the full sacramental life of their church . . . and that Section 69 of the Civil Code denies them the right to participate fully in the sacramental life of their religion." Oral Argument in Support of Petition at 4 (Oct. 6, 1947), *Perez v. Sharp*.

[17] Respondent's [Supplemental] Brief in Opposition to Writ of Mandate at 51 (filed Oct. 6, 1947), *Perez v. Sharp*.

[18] *Id.* at 51-52. County counsel began his oral argument: "In the present case, the petitioners do not show that it is religion that compels them to marry, but that it is their own worldly choice." Transcript of oral argument on behalf of Respondent, at 2, *Perez v. Sharp*.

persuasive.[19] Justice B. Rey Schauer and Justice Homer R. Spence both concurred in Justice John W. Shenk's opinion declaring that because "petitioners' alleged right to marry is not a part of their religion in the broad sense that it is a duty enjoined by the church," their claims were weaker even than those of Mormon polygamists in *Reynolds v. United States*,[20] whose faith had affirmatively *required* them to take more than one wife.[21] In contrast with the Mormon polygamists, Perez and Davis could argue only "that their marriage is permissive under the dogma, beliefs and teaching of the church to which they claim membership and that the sacrament of matrimony will be administered to them by a priest of the church if and when a license issues."[22]

Yet the Catholic couple's religious-liberty argument carried the day. For though no opinion was joined by a majority of the court, Justice Shenk's three-justice opinion was but a dissent.

Justice Roger J. Traynor, himself a Catholic, filed a three-justice plurality opinion, joined by Chief Justice Phil S. Gibson and Justice Jesse W. Carter. It set out the mixed-race couple's argument,

> that the statutes in question are unconstitutional on the grounds that

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[19] *Perez*, 32 Cal. 2d at 742-63, 198 P.2d at 35-47 (Shenk, J., joined by Schauer and Spence, J.J., dissenting).

[20] 98 U.S. 145, 161 (1878).

[21] *Perez*, 32 Cal. 2d at 744, 198 P.2d at 36 (Shenk, J., dissenting).

[22] *Id.*

> they prohibit the free exercise of their religion and deny to them the right to participate fully in the sacraments of that religion. They are members of the Roman Catholic Church. They maintain that since the church has no rule forbidding marriages between Negroes and Caucasians, they are entitled to receive the sacrament of matrimony.[23]

Writing for his three-justice plurality, Justice Traynor declared that if "the law is discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well."[24] Justice Edmonds, a "Christian Scientist for whom religious freedom mattered,"[25] provided the fourth vote – which was needed for a precedential majority on the seven-justice tribunal. He filed a separate concurring opinion unequivocally holding that the right to marry "is protected by the constitutional guarantee of religious freedom."[26] By denying legal standing to the marriage of two Catholics, whose Church allowed people of different races to marry, the State of California had violated their religious freedom.

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[23] *Perez*, 32 Cal. 2d at 713, 198 P.2d at 18 (Traynor plurality).

[24] *Id.*, 32 Cal. 2d at 713-14, 198 P.2d at 18 (Traynor plurality).

[25] Botham, *supra* note 10, at 42.

[26] *Perez*, 32 Cal. 2d at 740, 198 P.2d at 34 (Edmonds, J., concurring); *see* Botham, *supra* note 10, at 42 ("Justice Edmonds cast the deciding vote that gave victory to Andrea Perez and Sylvester Davis."; "what is clear is that Edmond's opinion shifted the entire outcome of the case").

Justice Traynor's plurality opinion addressed religious liberty only briefly, and then devoted greater attention both to more general equal-protection concerns and to the character of civil marriage as a fundamental secular right. But Justice Edmonds' separate concurrence, grounded on religious liberty, provided the rationale on which a majority of the court's justices agreed: "By a four-to-three vote, the court invalidated California's antimiscegenation law on the basis of the constitutional right to freedom of religion."[27] Applying familiar rules of *stare decisis*, religious liberty provided the decision's precedential *ratio decidendi*.[28]

If *Perez* is correct, then laws denying same-sex couples the right to marry are an unconstitutional abridgment of those couples' religious liberty to marry, and of their faith communities' and clergy's right to celebrate and solemnize their marriages – just as California's law denying legal recognition to mixed-race unions violated a Catholic couple's religious liberty, as well as their right to equal protection of the laws.

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[27] David W. Southern, *John LaFarge and the Limits of Catholic Interracialism, 1911-1963*, at 274 (Baton Rouge & London: Louisiana State University Press, 1996).

[28] *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007); *Marks v. United States*, 430 U.S. 188, 193 (1977); *Estate of Lopes*, 152 Cal. App. 3d 302, 306-07, 199 Cal. Rptr. 425, 428-29 (1984); *People v. Harris*, 71 Cal. App. 3d 959, 966, 139 Cal. Rptr. 778, 783 (1977); 9 B.E. Witkin, California Procedure, Appeal §809, at 879 (5th ed. 2008) ("It is possible for a concurring opinion, not the main opinion, to constitute the majority position of the court on a particular point."); *see also id.*, Appeal §538, at 608-10.

C. Catholic Bishops Endorsed *Perez v. Sharp's* Religious-Liberty Rationale When this Court Considered a Baptist Couple's Appeal in *Loving v. Virginia*

When the constitutionality of state laws proscribing mixed-race marriages got to this Court in *Loving*, nearly two decades after *Perez*, Catholic bishops weighed in as *amici curiae* fully supporting *Perez*'s religious-liberty rationale.[29]

The case arose from Virginia. Rejecting a Baptist couple's contention that statutes proscribing their marriage were unconstitutional, the Virginia trial court invoked what many Americans once took as binding Scriptural law – that "Almighty God created the races" and "that He did not intend for the races to mix."[30] Virginia's Supreme Court affirmed, following its own 1955

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[29] *See supra* note 5; *see also* Isaacson, *Free Exercise for Whom?*, *supra* note 8, online working draft at 19-22.

[30] *Loving*, Circuit Court opinion, reprinted in *Loving*, No. 66-395, Transcript of Record, at 8, 16. The trial court declared:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id.; *see* Pascoe, *supra* note 10, at 275; *Loving*, 388 U.S. at 3 (quoting trial court); *see also Bowers v. Hardwick*, 478 U.S. 186, 210 n.5 (1986) (Blackman, J., joined by Brennan, Marshall & Stevens, J.J., dissenting) (same quote); *cf. People v. Greenleaf*, 780 N.Y.S.2d 899, 902 (New Paltz Justice Ct. 2004).

decision in *Naim v. Naim*,[31] which had sustained Virginia's laws against racial mixing in "a public institution established by God himself."[32]

When *Loving* reached this Court, sixteen Catholic bishops and apostolic administrators filed an *amicus curiae* brief asserting that Virginia's laws denying recognition to mixed-raced marriages violated the Baptist couple's religious liberty.[33] Even with respect to marriages outside their own Church, the Catholic bishops opposed permitting legal enactments grounded upon the "views of third persons to determine one of the most personal and sensitive of human decisions."[34] They urged this

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[31] 197 Va. 80, 87 S.E.2d 749 (1955), *vacated and remanded*, 350 U.S. 891 (1955), *reinstated on remand*, 197 Va. 734, 90 S.E. 2d 849 (Va. 1956), *motion to recall mandate denied*, 350 U.S. 985 (1956).

[32] *Naim*, 197 Va. at 84, 87 S.E.2d at 752 (quoting *State v. Gibson*, 36 Ind. 389, 402-03 (1871)). Following *State v. Gibson*, 36 Ind. at 404, *Naim* sustained Virginia law barring marriage between members of different races, declaring "that the natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures." *Naim*, 197 Va. at 84, 87 S.E. 2d at 752. God's law was a common refrain in the precedents sustaining such laws. *See, e.g., Gibson*, 36 Ind. at 404; *Green v. State*, 58 Ala. 190, 195 (1877) ("Surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct."); *Scott v. Georgia*, 39 Ga. 321, 326 (1869) (holding that members of different races may not intermarry because the "God of nature made it otherwise").

[33] *See* Botham, *supra* note 10, at 3, 170-74.

[34] Botham, *supra* note 10, at 170-74; Catholic Bishops' *Loving* Brief, *supra* note 5, at 17.

Court to follow the lead of *Perez*, where Justice Traynor's three-justice plurality opinion had found that California's anti-miscegenation statute "unconstitutionally restricted both religious freedom and the liberty to marry."[35] The critical fourth vote in *Perez*, the Catholic bishops underscored, was provided by Justice Edmonds' "separate concurring opinion," clearly holding the right to marry "'is protected by the constitutional guarantee of religious freedom.'"[36]

The Catholic bishops concluded by asserting that "marriage is an exercise of religion protected by the First and Fourteenth Amendments" and that "as such, marriage can be restrained only upon a showing that it constitutes a grave and immediate danger to interests which the state may lawfully protect."[37] That view accords with the *ratio decidendi* of *Perez*, and with this Court's holding in *Turner* that depriving prison inmates, as a group, of the right to marry trampled their "exercise of religious faith." *Turner*, 482 U.S. at 96.

The Catholic bishops believed then that religious liberty protected the marriage right not only of

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[35] Catholic Bishops' *Loving* Brief, *supra* note 5, at 18. The Catholic Bishop's brief thus "reiterated California Supreme Court Justice Roger Traynor's assertion that if California's anti-miscegenation statutes were unconstitutional and discriminatory, then they restricted two fundamental human liberties: religious freedom and the freedom to marry." Botham, *supra* note 10, at 172.

[36] Catholic Bishops' *Loving* Brief, *supra* note 5, at 18 (quoting *Perez*, 32 Cal. 2d at 740, 198 P.2d at 34 (Edmonds, J., concurring)).

[37] Catholic Bishops' *Loving* Brief, *supra* note 5, at 19.

Catholics, but of non-Catholics as well. For Catholics and their marriages are, as a matter of law, not specially privileged those of other faiths.

If religious liberty and equal protection of the law mean anything, the right to marry is one properly enjoyed by all Americans, of all faiths, including those that bless marriages of same-sex couples.

D. *Perez* and *Turner* Remain Good Law that this Court Should Reaffirm and Follow

Though *Loving* cited – and thus implicitly rejected – the Virginia courts' religious rationale for *outlawing* mixed-race marriages,[38] and though this Court cited *Perez* with approval,[39] it did not clearly endorse *Perez*'s religious-liberty rationale. In light of this Court's subsequent holding in *Turner*, that marriage most often involves a constitutionally protected "exercise of religious faith," 482 U.S. at 96, the Court should do so now.

For *Perez*'s religious-liberty rationale remains sound law that should apply as fully to a same-sex couple who would marry in a Reform or Reconstructionist synagogue, or in a Unitarian Universalist, United Church of Christ, or Metropolitan Community church, just as it applies in *Perez* to a mixed-race couple seeking to marry in a Catholic church.

Two objections must, of course, be answered. One is that the *Perez* holding's religious-liberty

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[38] *Loving*, 388 U.S. at 3.

[39] *Id.* at 6 n.5.

rationale conflicts with this Court's decisions sustaining criminal penalties for Mormon polygamy, as the *Perez* dissenters insisted.[40] The other is that *Perez* was impliedly overruled by this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that Oregon may criminalize sacramental use of peyote.

Perez does not conflict with this Court's decisions rejecting free-exercise challenges to federal laws criminalizing Mormon polygamy. For as Justice Edmonds' separate concurrence noted, those decisions were grounded in what this Court perceived as compelling justifications that simply find no parallel here.[41]

In *Reynolds v. United States*, 98 U.S. 145 (1878), this Court embraced the view of Professor Francis Lieber, that polygamy posed a grave threat to the very existence of democratic institutions: "In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the Government of the people, to a greater or less extent, rests." *Id.* at 165-66. The Court grounded *Reynolds'* holding on the assumption that "polygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." *Id.* at 166. Congress could criminalize polygamy "because of the evil

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[40] *See Perez*, 32 Cal. 2d at 744-45, 198 P.2d at 36 (Shenk, J., dissenting).

[41] *See Perez*, 32 Cal. 2d at 741-42, 198 P.2d at 35 (Edmonds, J., separate concurrence).

consequences that were supposed to flow from plural marriages" as harbingers of despotism threatening democratic order itself.[42]

To the same effect is *Davis v. Beason*, 133 U.S. 333 (1890), which reaffirmed *Reynolds*' holding and rationale for criminalizing polygamy. *Davis* added that a system of plural marriage will "tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community." *Id.* at 341.

Same-sex relationships are entirely different from the patriarchal polygamous systems condemned by *Reynolds* and *Davis*. Where Mormon polygamy was grounded in patriarchal inequality, and the subjection of women as a class, today's same-sex marriages are grounded in recognizing the full humanity, dignity, and equality of *all* citizens. Same-sex couples' marriages thus pose

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[42] *Id.* at 168. *See also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 569 (1993) (Souter, J., concurring) (citing *Reynolds*' rationale); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 113-14 (Cambridge, Mass. & London: Harvard University Press, 2000) (discussing *Reynolds*); Mark Philip Strasser, *On Same-Sex Marriage, Civil Unions, and the Rule of Law: Constitutional Interpretations at the Crossroads* 124-25 (Westport, Connecticut: Praeger Publishers, 2002).

none of the threats to our democratic institutions that were said to flow from polygamy.[43]

Neither will recognizing full civic equality for gay and lesbian citizens "destroy the purity of the marriage relation," "disturb the peace of families," "degrade women," or "debase man," as *Davis* put it. 133 U.S. at 341. Committed same-sex relationships cannot even remotely be characterized as crimes "pernicious to the best interests of society," to again quote *Davis*. *Id.* Neither Congress nor the States may criminalize peaceable same-sex relationships. *See Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

Though nineteenth-century Mormons' social system of patriarchal polygamy might be characterized as "a defiant stand against the West's most basic political and personal values," it should be clear that the movement toward same-sex marriage honors egalitarian personal autonomy and full human dignity for all.[44] No credible

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[43] *See generally* E.J. Graff, *What is Marriage For?: The Strange Social History of Our Most Intimate Institution* 168-77 (Boston: Beacon Press, rev. ed. 2004).

[44] *Graff*, *supra* note 42, at 177. Judge Richard A. Posner has suggested that prohibiting polygamy may further egalitarian objectives, observing that "the prohibition of bigamy (polygamy) . . . increases the sexual and marital opportunities of younger, poorer men." Richard A. Posner, *Sex and Reason* 215 (Cambridge: Harvard Univ. Press, 1992). He observes that "polygamy is anomalous in a system of companionate marriage, because a man is unlikely to have the same reciprocal relationship of love and trust with multiple wives; as well as with the fact already noted that it benefits a few men at the expense of the many." *Id.* at 216. Nor has polygamy generally been associated with decent

argument can be made that recognizing same-sex couples' full citizenship and right to marry might produce the kind of social problems this Court concluded would flow from the Mormons' system of polygamy.

Neither has *Perez* been impliedly overturned by this Court's holding in *Employment Division v. Smith*, 494 U.S. 872, 874 (1990), that the Free Exercise Clause "permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug."

Obviously, no criminal prohibition is at issue here, and *Lawrence* flatly bars criminal sanctions for consensual same-sex relationships. But more than that, *Smith* itself recognized this Court's many holdings that "the First Amendment bars application" even of "a neutral, generally applicable law to religiously motivated action" when religious-liberty interests operate "in conjunction with other constitutional protections, such as freedom of speech and of the press,"[45] or

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treatment of women, for as Judge Posner observes: "It may not be an accident that the congeries of practices loosely referred to as 'female circumcision' – primarily, the removal of the clitoris and (until marriage) the sewing up of the entrance to the vagina (infibulation) – are found only, as far as I am able to determine, in polygamous societies." *Id.* at 256-57.

[45] *Smith*, 494 U.S. at 881 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v.*

"the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children."[46] This case involves such additional interests.

This Court has many times recognized marriage itself as a fundamental liberty interest.[47] Marriage rests at the heart of the interests protected by this Court's decisions protecting autonomy in matters of family life – such as *Pierce*, 268 U.S. at 534-35, *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), and *Yoder*, 406 U.S. 205, as well as by the right to privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and extended in other decisions.[48]

The element of free speech also is present – implicated by what marriage communicates. This Court held in *Turner* that even prison inmates retain their fundamental right to marry, because "[m]any important attributes of marriage remain

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Pennsylvania, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573 (1944) (same)).

[46] *Smith*, 494 U.S. at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school)).

[47] *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving*, 388 U.S. at 12 ("[m]arriage is one of the 'basic civil rights of man'") (citation omitted).

[48] *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990).

. . . after taking into account the limitations imposed by prison life." *Turner*, 482 U.S. at 95. These include the fact that "inmate marriages, like others, are expressions of emotional support and public commitment," *id.*, as well as the fact that "many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication." *Id.* at 96.

The expressive element of marriage clearly implicates "speech in its full constitutional sense."[49] "When two people marry . . . they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags."[50] "If the First Amendment deserves interpretations that will 'protect a rich variety of expressional modes,' there is no reason in logic for excluding the expression that is at the heart of [our] most intimate associations."[51]

In sum, the religious-liberty holdings of *Perez* and *Turner* remain good law, under which state

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[49] Bryan H. Wildenthal, *To Say "I Do": Shahar v. Bowers, Same-Sex Marriage, and Public Employee Marriage Rights*, 15 Ga. St. U. L. Rev. 381, 382 (1998); *see also* David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. Cal. L. Rev. 925 (2001).

[50] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 654 (1980).

[51] *Id.* at 654 (quoting Laurence Tribe, *American Constitutional Law* 579 (Mineola, N.Y.: Foundation Press, 1978)); *see generally* Cruz, *supra* note 49.

laws' differential treatment of same-sex couple's marriages cannot be sustained.

E. According Equal Dignity to Same-Sex Couples' Marriages Poses No Threat to Religious Liberty

Some who oppose equal marriage rights have portrayed same-sex couples' marriages as threatening the religious liberty of people whose faith traditions do not bless same-sex relationships. This, some have even argued, may provide a rational basis for denying same-sex couples the right to marry. They are mistaken. Fears that same-sex couples' marriages threaten anyone's religious liberty are simply unfounded.[52]

In the United States, a legally divorced man or woman may lawfully marry again. This poses no threat to the liberty of Roman Catholics, whose Church both pronounces divorce "a grave offense against natural law," and condemns remarriage by, or to, a divorced person as "public and permanent adultery."[53] It directs divorced persons and gay

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[52] *See generally*, Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, *supra* note 6, 8 Stan. J. Civ. Rts. & Civ. Libs. at 135-47.

[53] The *Catechism of the Catholic Church* explains:

> *Divorce* is a grave offense against the natural law. . . . Contracting a new union, even if it is recognized by civil law, adds to the gravity of the rupture: the remarried spouse is then in a situation of public and permanent adultery. . . .

Catechism of the Catholic Church ¶2384 (Washington, D.C.: Libreria Editrice Vaticana, 2d ed., 2000) (emphasis in original).

people alike to lead lives of chastity and celibacy.[54] Roman Catholic doctrine treats civil marriages of the legally divorced and remarried, and civil marriages of same-sex couples, both as nullities: "The Church, since she is faithful to her Lord, cannot recognize the union of people who are civilly divorced and remarried."[55]

It thus is hard to fathom how civil marriages of same-sex couples could pose a greater threat to Roman Catholics' religious liberty than do the civil marriages of many millions of Americans who have legally divorced and remarried in contravention of the Church's clear doctrine. And if Roman Catholics' religious liberty is not threatened by according legal recognition to such marriages, it is hard to see how the religious liberty of others, such as Southern Baptists or Mormons, could be at risk either.

Most purported "threats" to "religious liberty" come not from according equal dignity to same-sex

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[54] *Compare Catechism of the Catholic Church*, ¶1650 (advising divorced persons to live "in complete continence"), *with Catechism of the Catholic Church*, ¶2359 ("Homosexual persons are called to chastity").

[55] U.S. Conference of Catholic Bishops, *Compendium of the Catechism of the Catholic Church*, at ¶349 (Washington, D.C.: Libreria Editrice Vaticana, 2006); *see also Catechism of the Catholic Church*, *supra* note 53, ¶1650 (with respect to the civilly divorced "a new union cannot be recognized as valid, if the first marriage was"); U.S. Conference of Catholic Bishops, *United States Catholic Catechism for Adults*, at 287 (Washington, D.C.: U.S. Conference of Catholic Bishops, 2006) ("[i]n the case of those who have divorced civilly and remarried . . . the Church considers the second marriage invalid").

marriages, but from concerns about the enforcement of civil-rights laws in the minority of states whose statutes prohibit discrimination on the basis of sexual orientation in employment, housing, and public accommodations.[56] Yet when some churches insisted that racial integration was contrary to God's law,[57] and Southern Protestants cited religious grounds for segregation, this Court rejected as "patently frivolous" contentions that complying with the Civil Rights Act of 1964 "'contravenes the will of God' and constitutes an interference with the 'free exercise of religion.'" *Newman v. Piggie Park Enterprises Inc.*, 390 U.S. 400, 420 n.5 (1968) (citation omitted). Contentions

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[56] Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation* Discrimination, 100 Cal. L. Rev. 1169, 1190 & n.66 (2012) (listing states). As it happens, none of the states appearing as respondents here has enacted civil-rights laws to protect gay or lesbian citizens from discrimination in employment, housing, or public accommodations. *See id.*

[57] For one of many popular expressions of this view see Carey Daniel, *God The Original Segregationist and Seven Other Segregation Sermons* (Dallas: Carey Daniel, n.d., *circa* 1957). *Time* magazine reported in its November 5, 1956, issue that the Southern Baptist "Rev. Carey Daniel, pastor of West Dallas' First Baptist Church and brother of Texas' Democratic Senator (and candidate for governor) Price Daniel, offered to turn his church buildings into an all-white school if integration should be forced upon Dallas' public schools." *Religion: Words & Works*, *Time*, Nov. 5, 1956, at 70, available at http://content.time.com/time/magazine/article/0,9171,865596,00.html (accessed March 3, 2015); *see* Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, *supra* note 6, 8 Stan. J. Civ. Rts. & Civ. Libs., at 148 & n.123.

that civil rights protections for LGBT people might violate free exercise should be deemed similarly insubstantial.[58]

The notion that civil rights laws will be employed to persecute religious minorities is preposterous. The *amici* who raised dire cries of threatened persecution in prior proceedings, and that may be expected to do so again, purport to speak not on behalf of helpless minorities, but for America's *largest* and *most powerful* religious movements. The Catholic Church ranks first, with more than 68 million adherents in the United States, and the Southern Baptist Convention second, with more than 16 million.[59] The Becket Fund said in its *Hollingsworth v. Perry amicus* brief that "an estimated 160 million Americans – 97.6% of all religious adherents in the United States and more than half of the entire population – belong to religious bodies that affirm the traditional definition of marriage."[60] The legitimate interests of so many will not be trampled.

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[58] *See generally* James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 Harv. Civ. Rts. Civ. Lib. L. Rev. __ (forthcoming 2015) (working draft online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400100 (accessed March 3, 2015).

[59] *See Yearbook of American & Canadian Churches 2012*, at 11-14 (Eileen W. Lindner, ed.; Nashville: Abington Press for the National Council of Churches, 2012).

[60] Amicus Curiae Brief for the Becket Fund for Religious Liberty, at 6 (filed Jan. 28, 2013), *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) (citation omitted).

There is, of course, no danger that Americans will be charged with "hate crimes" for opposing same-sex relationships on religious grounds. This Court's decision in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), makes sure of that.

Neither is there any danger that churches will lose their tax-exempt status, though in *Hollingsworth v. Perry* The Becket Fund for Religious Liberty held out the prospect of "'[p]rivate churches losing their tax exemptions'" for opposing same-sex marriages.[61] In fact, however, the Becket Fund's own "touchstone" publication on the subject admits that "so long as large and historically important churches refuse to recognize gay marriages," it is "unlikely that the executive branch of any jurisdiction would try to revoke tax exemptions over the issue."[62]

Much ink nonetheless has been spilled about New Jersey's supposed revocation of a church's tax-exempt status. The Catholic Answers *amicus* brief in *Hollingsworth v. Perry* reported that "an evangelical ministry was found to have violated state antidiscrimination law for refusing to rent its facilities for a same-sex commitment ceremony."[63] The Catholics for the Common Good *amicus* brief bemoaned the resulting "denial of tax exemption for refusal to rent [a] religiously owned pavilion for

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[61] *Id.* at 26 n.36 (citation omitted).

[62] Douglas Laycock, *Afterword* to *Same-Sex Marriage and Religious Liberty* 189, 193 (Douglas Laycock, *et al.*, eds.; The Becket Fund, 2008).

[63] Brief *Amicus Curiae* Brief for Catholic Answers, *et al.*, (filed Jan. 29, 2013), *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) at 19.

a civil union ceremony."[64] The Becket Fund's circuit-court brief declared that the State of New Jersey had "withdrawn the property tax exemption of a beach-side pavilion owned and operated by a Methodist Church, because the Church refused on religious grounds to host a same-sex civil union ceremony."[65]

That was not so. The property in question was not owned by any church, but by a residential community, the Ocean Grove Camp Meeting Association, whose trustees are indeed Methodists, and which controlled "all of the land in the seaside community of Ocean Grove, New Jersey,"[66] whose population the 2010 Census placed at 3,342.[67] Ocean Grove leases out residential properties in the resort community, advertising on the Internet that it "welcomes everyone to enjoy this beautiful, seaside community without discrimination based on race, gender, income level, education, religion, or country of origin."[68] It obtained a New Jersey

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[64] *Amicus Curiae* Brief for Catholics for the Common Good at 32, (filed Jan. 28, 2013), *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

[65] *Amicus Curiae* Brief for the Becket Fund for Religious Liberty in Support of Defendants-Intervenors-Appellants and in Support of Reversal at 14 (filed Sept. 24, 2010), *Perry v. Brown* (f.k.a. *Perry v. Schwarzenegger*), 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696), 2010 WL 4075746.

[66] *Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo*, 339 Fed. Appx. 232, 235 (3d Cir. 2009).

[67] *See* Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, *supra* note 6, 8 Stan. J. Civ. Rts. & Civ. Libs., at 150.

[68] *Id.* at 150 n.137 (quoting *Frequently Asked Questions*, Ocean Grove Camp Meeting Ass'n). The beach community's publicly stated policy of nondiscrimination drew many gay

"Green Acres" real-property tax exemption for the community's beachfront boardwalk and pavilion not as religious properties, but as public facilities to be held open for all to enjoy on an equal basis.[69] A lesbian couple, who were long-term members of the residential community, thought that included them, so they applied to use the pavilion for a civil-commitment ceremony.[70]

When Ocean Grove denied its lesbian residents the use of their own residential community's supposedly public facilities, New Jersey officials found probable cause to conclude that it no longer qualified for the "Green Acres" tax exemption accorded to properties made available for nondiscriminatory public use.[71] No church's tax-exempt status was revoked, or even questioned.

Fears that same-sex couples' marriages pose grave threats to religious liberty simply are not grounded in reality.

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and lesbian residents: "By the mid-1990s, gay and lesbian couples were moving in, and by the time the controversy arose, about one-fourth of the residents were estimated to be same-sex couples." Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 Wash. & Lee J. Civil Rts. & Soc. Just. 3, 51-52 (2008) [hereinafter *Microperformances of Identity*].

[69] N.J. Office of the Att'y Gen., Dep't of Law & Pub. Safety, Div. on Civ. Rts, No. PN34XB-03008, Finding of Probable Cause, Bernstein v. Parker (Dec. 29, 2008).

[70] Poirier, *Microperformances of Identity*, *supra* note 68, at 76.

[71] *See* Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, *supra* note 6, 8 Stan. J. Civ. Rts. & Civ. Libs. at 150-51.

CONCLUSION

Consistent with principles of religious liberty recognized in *Perez* and *Turner*, and with equal protection of the laws for *all* Americans, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

ERIC ALAN ISAACSON
(Counsel of Record)
655 West Broadway, #1900
San Diego, CA 92101
Telephone: (619)231-1058
Email: eisaacson@rgrdlaw.com

STACEY MARIE KAPLAN
Kessler Topaz Meltzer & Check, LLP
One Sansome Street, #1850
San Francisco, CA 94104
Telephone: (415)400-3000

Attorneys for *Amici Curiae* California Council of Churches; California Faith for Equality; Unitarian Universalist Justice Ministry California; Northern California Nevada Conference, United Church of Christ; Southern California Nevada Conference, United Church of Christ; Pacific Association of Reform Rabbis ("PARR"); California Network of Metropolitan Community Churches

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